The second matter raised by Mr. Beloff is that we should make a ruling that the leave granted by the High Court to commence certiorari and prohibition proceedings in respect of other revoked licences should not have the effect of staying any action which the appellants might wish to take upon those licences. Again, our response to this submission is that this is not a matter which concerns this particular appeal. We do not feel any necessity of making any ruling beyond what is required in the present appeal.

In conclusion, we hold that there is no question of the licence becoming automatically invalid and that as the respondent was deprived of an opportunity to explain the invalidating event and to discharge the burden which would entitle it to a contrary decision of the Director, the appeal is therefore dismissed with costs. We also order that the deposit should be paid to the respondent on account of taxed costs.

As regards the cross-appeal by the respondent, we do not think that we should make any order as to costs since the issue raised in it is inextricably part and parcel of the main appeal.

Appeal dismissed.

Solicitors: *Reddi & Co.; Abdul Rahman, Chan, Jugah, Wan Ullok & Co.*

HUSSIN BIN SILLIT v. PUBLIC PROSECUTOR

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Mohamed Azmi S.C.JJ.) 12 February & 23 April 1988]

[Kuala Lumpur – Supreme Court Criminal Reference No. 4 of 1987]

Criminal Procedure – Alibi defence – Notice of defence – Reference to Supreme Court – Whether cautioned statement constitutes valid notice – Amendment of charge relating to time in charge – Whether notice of alibi defence need not be served to render evidence of alibi admissible – Courts of Judicature Act 1964, s. 66(1) – Criminal Procedure Code (FMS Cap. 6), ss. 113, 156 & 402A.

In this case, the accused was charged with rape. The accused sought at the trial to rely on the defence of alibi. No notice under section 402A of the Criminal Procedure Code had been given to the Public Prosecutor. However, the accused had made a cautioned statement to the police which was alleged to contain the defence of alibi. At the trial in the Sessions Court, the charge was amended by altering the time in the charge from "8:30 p.m." to "8.00 p.m." It was argued that because of this amendment in the charge the provisions of section 402A of the Criminal Procedure Code were no longer applicable. A the trial, the accused was convicted and sentenced to three years' imprisonment. The learned President rejected the accused's evidence of alibi. His appeal to the High Court was dismissed. The accused was given leave to refer two questions of law of public interest to the Supreme Court. The two questions as reframed were:

(a) whether a cautioned statement recorded under section 113 of the Criminal Procedure Code can constitute a valid notice under section 402A of the Criminal Procedure Code; if the answer is in the negative, then (b) whether in an offence where the charge is amended in the course of the trial relating to the time set out in the original charge, section 402A of the Criminal Procedure Code is not applicable, and notice required to be served thereunder need not be so served to render evidence in support of a defence of alibi admissible.

Held, answering both questions in the negative: (1) for the purpose of compliance with section 402A of the Criminal Procedure Code, actual written notice containing particulars of the alibi must be given to the Public Prosecutor within the prescribed period. Therefore, a cautioned statement recorded by the police under section 113 of the Criminal Procedure Code does not constitute a valid notice under section 402A of the Code. The answer to the first question is in the negative;

(2) the alteration in the charge as to time by half an hour could not possibly on the facts of the case alter the legal position as to the requirement of alibi notice. Both the original and amended charges refer to one and the same occasion and accordingly any argument on the basis of the whereabouts of the accused on "another occasion" which evidence is not "evidence in support of a defence of alibi" does not arise at all;

(3) the accused also failed to satisfy the court that by reason of any error or omission in the particulars given in the original charge, the time, place and date of the alleged offence were so uncertain that he was in fact misled in not supplying the particulars of alibi required to be given to the Public Prosecutor within the prescribed period, so as to justify the trial court to conclude that the disputed evidence which he intends to adduce at the trial is, having regard to the circumstances of the case, not "evidence in support of a defence of alibi" and thereby should remain outside the restriction of section 402A of the Code;

(4) having regard to the facts and circumstances of this case, in particular the nature of the offence, the particulars given in the charge, the materiality of the amendment and the type of alibi evidence intended to be adduced, the second question posed should also be answered in the negative.

Cases referred to:

(1) *Rangapula & Anor.* v. *Public Prosecutor* [1982] 1 M.L.J. 91 (expld).
(2) *Public Prosecutor* v. *Lim Chen Len* [1981] 2 M.L.J. 41 (apprvd).
(3) *Ku Lip See* v. *Public Prosecutor* [1982] 1 M.L.J. 194 (folld).
(4) *R.* v. *Lewis* [1969] 2 Q.B. 1 (distd).
(5) *R.* v. *Hassan* [1970] 1 Q.B. 423 (distd).

SUPREME COURT.

Mohamed Shafee Abdullah (*Abdul Ghani Mat Jair* with him) for the applicant.

Stanley Issac (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the judgment of the court): At the court sitting in Kota Kinabalu on 11 November 1987, the accused was allowed leave to refer two questions of law of public interest under section 66(1) of the Courts of Judicature Act 1964. The two questions for our determination have now been reframed thus:

(i) Whether a cautioned statement recorded under section 113 of the Criminal Procedure Code can constitute a valid notice under section 402A of the Criminal Procedure Code.

If the answer is in the negative, then

(ii) Whether in an offence where the charge is amended in the course of the trial relating to the time set out in the original charge, section 402A of the Criminal Procedure Code is not applicable, and notice required to be served thereunder need not be so served to render evidence in support of a defence of alibi admissible.

On 24 January 1985 the accused was convicted in the Sessions Court for an offence of rape under section 376 of the Penal Code and sentenced to three years' imprisonment from that date. His appeal to the High Court against both the conviction and sentence was dismissed by Charles Ho J. on 10 February 1987. Throughout the proceedings in the Sessions Court and the High Court, the accused was represented by counsel and was on bail.

One of the accused's main grounds of appeal in the High Court, as set out in paragraph 8 of his petition of appeal, was that "the learned trial President erred in law and fact when he rejected the appellant's defence of alibi when the provisions of section 402A of the Criminal Procedure Code have been complied with." Before us, it is conceded that no actual notice in writing to the Public Prosecutor was given by the accused under section 402A of the Criminal Procedure Code, either before 14 June 1983 when the accused first appeared in the Sessions Court, or before 22 October 1984 when the actual trial commenced. Section 402A(1) of the Criminal Procedure Code provides:

> "Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial."

Be that as it may, counsel for the accused argues that there is compliance with the provisions of section 402A because the cautioned statement given by the accused to the police contained the defence of alibi and that was sufficient notice to the Public Prosecutor for the purpose of that section. For this legal proposition, learned counsel for the accused is unable to cite any authority, local or foreign. We can only conclude that there are no known authorities to support such a vital legal proposition which involves the recognition of the doctrine of constructive notice in the provisions of section 402A. A statutory provision must be construed in favour of the person or class of persons for whose protection or benefit it was passed. From the wordings of section 402A, the statutory notice must be given by an accused person in writing to the Public Prosecutor at least ten days before the commencement of the trial, and we fail to comprehend how a cautioned statement made by the accused on 4 April 1981 to the police under section 113 of the Criminal Procedure Code in the course of police investigation and made before the accused was charged in court as an accused person can ever constitute a valid alibi notice under section 402A. The words used in the statutory provisions are clear and unambiguous. In our view, for purpose of compliance with section 402A, actual written notice containing particulars of the alibi must be given to the Public Prosecutor within the prescribed period. We would accordingly answer the first question in the negative, *i.e.* a cautioned statement recorded by the police under section 113 of the Criminal Procedure Code does not constitute a valid notice under section 402A of the Code.

As regards the second question, it is common ground that when the accused first appeared in the Sessions Court on 14 June 1983, the charge preferred against him was as follows:

> "That you on the 3rd of April 1981 at about 8.30 p.m. at Jalan Tun Fuad at Tanjung Lipat in the District of Kota Kinabalu, in the State of Sabah, committed rape on one Zainah bte. Gidoi, and thereby committed an offence punishable under section 376 of the Penal Code (F.M.S. Cap. 45)."

However, before the commencement of the actual trial on 22 October 1984, the prosecuting officer amended the time in the charge to "8.00 p.m." instead of "8.30 p.m.". It is relevant to note that the other particulars in the charge remained the same. In fact, it was never part of the accused's complaint in the courts below that the charge in any way lacked particulars. Since the amendment was a slight one, counsel for the accused did not raise any objection, and the charge was accordingly amended, read over and explained to the accused before the prosecution led evidence. Now, because of this amendment bringing forward the time by half an hour it is submitted on behalf of the accused that on the authority of *Rangapula & Anor.* v. *Public Prosecutor*[1] the provisions of section 402A of the Criminal Procedure Code are not applicable, and he should have been allowed to adduce evidence of his whereabouts between 7.30 p.m. and 10.30 p.m. on 3 April 1981 although no alibi notice had been served either in respect of the original or amended charge. The relevant passage in *Rangapula* reads as follows:

"In my judgment section 402A is not applicable and notice required to be served thereunder need not be so served to render 'evidence in support of a defence of alibi' admissible:

(a) where such evidence is in support of an alibi in respect of a day or time different from those specified in a charge; and

(b) where a charge is amended in the course of the trial relating to either the date, time or place set out in the original charge."

In dismissing the accused's appeal, Charles Ho J. avoided this particular issue by holding that in *Rangapula,* Yusuf Abdul Rashid J. "was speaking of a charge lacking in sufficient particulars and substantial amendment required to cure it", and as such the authority was of no assistance to the accused.

In *Rangapula,* the two accused appealed against their conviction under sections 326 and 324 of the Penal Code and on 13 April 1981, Yusuf Abdul Rashid J. in the High Court at Johor Bahru, although allowing the appeal on other grounds, upheld the exclusion of the alibi evidence and ruled that "a trial magistrate has no discretion to admit any evidence in support of a defence of alibi where the provisions of section 402A of the Criminal Procedure Code have not been complied with". As far as alibi evidence is concerned, that was the ratio of the case. Indeed, about one and half months earlier, the High Court in Kuala Lumpur had similarly ruled in *Public Prosecutor* v. *Lim Chen Len*[2] that the requirement of a pre-trial notice was mandatory and that the courts in this country had no discretion in the matter, unlike the position in England where by virtue of section 11(1) read with subsection (3) of the Criminal Justice Act 1967, leave under certain circumstances could still be obtained from the court to adduce alibi evidence notwithstanding the failure to give notice. *Lim Chen Len* was considered and approved by the Federal Court in *Ku Lip See* v. *Public Prosecutor*[3] at p. 196. Incidentally *Ku Lip See* was also a criminal reference arising out of a rape case.

Learned counsel for the accused seems to suggest that the learned judge in *Rangapula* had laid down two exceptions to the applicability of section 402A. With respect, it is not so clear whether by his conclusion his Lordship meant to create two exceptions to the mandatory rule on alibi notice, or whether it is meant merely to show two circumstances in which evidence adduced by the defence does not come within the meaning of evidence in support of a defence of alibi, so as to exclude them from the provisions of section 402A. If the former is the case, then we regret that we are unable to agree because it is clear law that where the defence is an alibi then, any evidence in support of that defence must be excluded unless notice is complied with. As was held in *Lim Chen Len* and approved by *Ku Lip See,* and also ruled by the learned judge himself in *Rangapula,* the court has no discretion to waive pre-trial notice where the evidence to be adduced by the defence is evidence in support of a defence of alibi. On the other hand, if what his Lordship meant was the latter which seems to be the case, then the two propositions cannot in our view be accepted as of general application as each case must necessarily depend on its factual situation for the purpose of determining whether a particular evidence is or is not in support of a defence of alibi. The answer to such question should take into consideration, *inter alia,* the nature of the offence, the particulars given in the charge, the materiality of the amendment, and the type of alibi evidence intended to be adduced. As was held by the Federal Court in *Ku Lip See:*

"A determination whether particular evidence is evidence in support of an alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. It is difficult if not impossible to envisage with reference to a particular charge what

evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that, 'What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act; or the alibi might not involve absolute impossibility, but only high improbability and yet be convincing. (See *Criminal Law Review* 1978, pp. 277-278 and also at p. 278 where it is further stated that 'a true alibi defence consists of an affirmative truth of the defendant's presence somewhere other than at the time and place alleged')."

We are of the opinion that if the *obiter dicta* of Yusuf Abdul Rashid J. on ruling (b), with which we are concerned, is purely based on *R.* v. *Lewis*[4] and *R.* v. *Hassan,*[5] then we must respectfully say that it is of doubtful authority as the two Court of Appeal cases are not concerned with an amendment of charge situation where the accused, as in the present case, has failed to comply with the requirement of notice in the first instance and is seeking to cure such omission on the basis that the accused is relieved entirely from such duty because of the subsequent amendment to the charge. The two English cases must be read in the context of a situation where the charge preferred against the accused did not contain sufficient particulars as to date and/or place of the alleged offence.

In *R.* v. *Lewis,*[4] the accused was arraigned on an indictment charging that on a day unknown between 10 and 19 February 1968 he dishonestly received stolen postal orders and other articles, but at the committal proceedings the case of the prosecution was that Louis had received physical possession of the stolen properties on Wednesday, 14 February. At the trial, Louis wished to adduce evidence of his whereabouts on Friday, 16 February to rebut prosecution evidence that on that date he was the driver of the motor car which contained a man who had cashed two of the stolen postal orders at a post office. The trial court took the view that since no particulars of alibi had been given as required by section 11 of the Criminal Justice Act 1967, the evidence of his whereabouts on Friday was inadmissible. On appeal, it was held that on the facts and circumstances of the case, the ruling was wrong. Thus, *Louis'* case was primarily concerned with what was and what was not evidence in support of an alibi within the definition of section 11(8) in a situation where the date of the alleged offence was unknown according to the charge, but at the committal proceeding the offence was alleged to have been committed on Wednesday, 14 February. It was accordingly held that evidence in support of an alibi applied only to evidence relative to the whereabouts of the accused on 14 February, *i.e.* the date when the offence was committed as alleged during the committal proceeding. Be that as it may, we rule on the basis of *R.* v. *Lewis*[4] that the whereabouts of the accused on "another occasion" as distinct from the occasion in the charge must be excluded. This means only his whereabouts on the occasion of the alleged commission of the offence as stated in the charge, but not his whereabouts on other occasions, is evidence in support of a defence of alibi. In our judgment, the relevant occasion of the crime is governed by the date and place particularized in the charge, although time is invariably given in the charge as merely approximate. In *R.* v. *Lewis*[4] it was held that where the question arose as to the place and date of the offence for the purpose of determining whether the evidence was in support of a defence of alibi within the definition of section 11(8), the issue "had to be resolved on the committal charges and depositions available to the defendant at the end of the proceedings before the examining justices". The soundness of this ruling in England can be understood by the requirement under section 11 of the Criminal Justice Act that the alibi notice must be given seven days from the end of proceedings before the examining justices, as distinguished from our section 402A which requires notice to be given at least ten days before the commencement of the trial.

In *R.* v. *Hassan*[5] the Court of Appeal was concerned with an offence of a continuing nature – living on the immoral earnings of prostitution – where the commission of the offence could not be anchored to a particular place. The crime was alleged to have been committed "in the city of Cardiff" on 29 July 1968 and on other days between that date and 21 August 1968. It was held that in such a situation, what the accused did on an isolated incident on 20 August was not in the circumstances of the case "evidence in support of an alibi" and therefore not subject to the restriction of alibi notice. In our opinion, the Court of Appeal never intended their decision to apply to every amendment situation.

We are unable to agree that the two English authorities can be made a valid basis for the legal proposition that the requirement of notice under section 402A does not apply in every case where the charge is amended as to time, irrespective of whether the amended time refers to the same or

different occasion from the original charge. It should be borne in mind that where the charge relates to only one offence, merely amending the date, place or time in the charge would not necessarily constitute amending the offence, and under section 156 of the Criminal Procedure Code, "no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission." Thus, under illustration (d) of section 156, it is illustrated, " 'A' is charged with the murder of John Smith on 6 June 1910. In fact the murdered person's name was James Smith and the date of the murder was 5 June 1910. 'A' was never charged with any murder but one, and had heard the inquiry before the magistrate which referred exclusively to the case of James Smith. The court may infer from these facts that 'A' was not misled, and that the error in the charge was immaterial." Clearly, each situation must depend on the facts and circumstances of the particular case in determining whether any amendment as to time, date or place affected before or in the course of the trial entails changing the offence with which the accused is charged into an entirely different offence. There is no reason to suppose that every amendment, either before or after commencement of the trial, must necessarily change the occasion in the original charge into an entirely different occasion so as to exclude evidence pertaining to it from being "evidence in support of a defence of alibi".

Section 11(8) of the Criminal Justice Act 1967 provides:

" 'Evidence in support of an alibi' means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission."

In the absence of a statutory definition in section 402A(1) of the words "evidence in support thereof", *i.e.* evidence in support of a defence of alibi, we agree with the Federal Court in *Ku Lip See*[3] that their meaning cannot differ from that assigned by section 11(8) of the English Act on the term "evidence in support of an alibi". In the instant case, the evidence disclosed that the accused was with his victim for approximately one hour from about 7.30 p.m. when he gave her a lift in his motor car. Adopting closely section 11(8) for the interpretation of "evidence in support of a defence of alibi", we are of the opinion that the amendment of the charge from "about 8.30 p.m." to "about 8.00 p.m." did not afford the accused an escape from the ambit of the definition, and could not in the circumstances of the case relieve the accused from the duty to give alibi notice regarding his whereabouts from 7.30 p.m. to 10.30 p.m. on the date in question. Not only evidence pertaining to the one hour that he and the victim were alleged to be together but also evidence relative to his whereabouts during that particular evening on 3 April 1981 must be considered as one occasion or one single event or transaction. Whether the charge relates to 8.00 p.m. or 8.30 p.m., his whereabouts on the evening in question showing or tending to show that by reason of his presence at some other place or area at a particular time, he cannot be or is unlikely to be at the place where the offence was committed, should be classified as evidence in support of a defence of alibi. As such, the alteration in the charge as to time by half an hour could not possibly on the facts of the case alter the legal position as to the requirement of alibi notice. In our view, both the original and amended charges refer to one and the same occasion on the evening of 3 April 1981, and accordingly any argument on the basis of the whereabouts of the accused on "another occasion" which evidence is not "evidence in support of a defence of alibi" does not arise at all.

The accused has also failed to satisfy us that by reason of any error or omission in the particulars given in the original charge, the time, place and date of the alleged offence were so uncertain that he was in fact misled in not supplying the particulars of alibi required to be given to the Public Prosecutor within the prescribed period, so as to justify the trial court to conclude that the disputed evidence which he intends to adduce at the trial is, having regard to the circumstances of the case, not "evidence in support of a defence of alibi" and thereby should remain outside the restriction of section 402A. Both in the original and amended charges, the commission of the offence of rape was alleged to have taken place on the evening of 3 April 1981 at Jalan Tun Fuad, Tanjung Lipat, Kota Kinabalu. Having regard to the full particulars given in the original charge as to the date and place of the alleged offence, and the nature of the subsequent amendment effected before the commencement of the actual trial, we are of the view that in the light of the facts and circumstances of this case, no reasonable judge can possibly conclude that the whereabouts of the accused between 7.30 p.m. and 10.30 p.m. on the evening of 3 April

1981 is not "evidence in support of a defence of alibi", and it makes no difference whether the approximate time given in the charge is "about 8.00 p.m." or "about 8.30 p.m.". Any evidence to be adduced by the defence on the whereabouts of the accused on the evening of 3 April 1981, showing or tending to show that by reason of his presence elsewhere, he was not or was unlikely to have been at Jalan Tun Fuad, Kota Kinabalu and therefore would be essentially inconsistent with his participation in the crime, must be excluded unless prior notice has been given. The exclusion of the alibi evidence in this particular case was therefore correct in law.

We would hasten to add that if alibi notice had been served in relation to the original charge, then the accused would be under no duty pursuant to the provisions of section 402A to serve a second notice merely because the prosecution had elected to amend the charge at the commencement or in the course of the trial. In such a situation, any evidence of the whereabouts of the accused on another occasion or not relative to the evening of 3 April 1981 could continue to be excluded from the restriction notwithstanding any subsequent amendment of the charge. In short, evidence of the whereabouts of the accused on a particular occasion which would have been admissible without notice under the original charge would not become inadmissible as a result of the charge being subsequently amended in such manner as to render that particular occasion as the amended time of the alleged commission of the crime.

Having regard to the facts and circumstances of this case, in particular the nature of the offence, the particulars given in the charge, the materiality of the amendment, and the type of alibi evidence intended to be adduced, we are of the opinion that the second question posed should also be answered in the negative.

Solicitors: *Ghani & Co.*

HAJI P. SHAUKAT ALI BIN GHANI & ORS. v. LEE KHENG GNOH

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 13 October 1987 & 22 April 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 425 of 1986]

Civil Procedure – Originating petition – Company – Summons for directions – Order in terms – Appeal – R.H.C. 1980, O. 25 & O. 88 – Companies Act 1965, s. 181.

In this case, the respondent had brought an originating petition relating to a company (the third appellant) in which she and the first and second appellants were the directors. The respondent complained that the first and second appellants "have wantonly and discriminately conducted the affairs of the company in a manner burdensome, harsh, wrongful and oppressive to the petitioner in utter disregard to her rights and interests as a shareholder". The respondent-petitioner filed a summons for directions and an order in terms was made. The appellants appealed and at the appeal relied on three grounds of appeal: (a) that the learned judge erred in allowing the petition to be amended by adding the third appellant as a party; (b) that the learned judge erred in law in making a substantive order, that is, in directing that certain moneys due to the company be paid into court; (c) that the learned judge erred in directing that (i) the statements in the affidavit of the respondent-petitioner be admissible in evidence at the trial without calling as a witness the maker of the statements and (ii) the evidence of certain facts be received at the trial by statements on oath of information and belief.

Held, allowing the appeal: (1) the order for adding the third appellant company as a party was a separate order made at the hearing of a separate application. No notice of appeal appeared to have been filed against that order;

(2) the order made by the learned judge and which was complained of was an order on a substantive matter under one of the prayers in the original petition and should not have been made at the hearing of the summons for directions brought under Order 88 or Order 25 of the Rules of the High Court. The matter should be considered at the trial and should be deleted from the order;

(3) it is up to the respondent-petitioner whether to give oral evidence at the trial or not but the appellants, at the hearing of the petition, should not be prevented from cross-examining her on her statements in the affidavit. The order made should be read subject to the right of the appellants to cross-examine;

(4) The respondent-petitioner has to prove the facts in accordance with the law of evidence and hearsay evidence is inadmissible. The direction allowing such hearsay evidence must therefore be deleted from the order.

SUPREME COURT.

M. S. Murthi for the appellants.

Allen T. Muttiah for the respondent.

Cur. Adv. Vult.